Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Ninth Circuit holds that mandatory minimum penalty in 18 U.S.C. § 3583(g)—revocation of supervised release for drug possession—may not be required when underlying offense was committed before effective date of that section. Defendant committed his offenses in April and May of 1988; he pled guilty and was sentenced in 1990. On Dec. 31, 1988, the supervised release statute was amended to provide that release must be revoked for possession of a controlled substance and the defendant sentenced "to serve in prison not less than one-third of the term of supervised release." 18 U.S.C. § 3583(g). Defendant began serving his supervised release term in Dec. 1990, had it revoked in Aug. 1992 for drug possession, and was sentenced under § 3583(g) to 12 months, one-third of his term of supervised release. The district court ruled that even though defendant's original offenses occurred before § 3553(g) became effective, the conduct that caused the revocation occurred thereafter and the ex post facto clause was not violated by imposing sentence after revocation under § 3553(g).

The appellate court reversed. "We find virtually dispositive the strong line of cases that decides this precise issue in connection with revocation of parole . . . . These cases hold that the ex post facto clause is violated when a parole violator is punished in a way that adversely affects his ultimate release date under a statute that was adopted after the violator committed the underlying offense but before he violated the terms of his parole. For purposes of an ex post facto analysis, there is absolutely no difference between parole and supervised release. . . . In both cases, the question is at what time the prisoner is to be released from prison. A delay in that date constitutes the same punishment whether it is imposed following a parole violation or a violation of supervised release." *Accord U.S. v. Parriett,* 974 F.2d 523, 526–27 (4th Cir. 1992).

U.S. v. Paskow, No. 92-50616 (9th Cir. Nov. 26, 1993) (Reinhardt, J.).

See *Outline* at VII.B.2.

U.S. v. O'Neil, No. 93-1325 (1st Cir. Dec. 15, 1993) (Selya, J.) (Remanded: "We hold that the [supervised release revocation] provision (SRR), 18 U.S.C. § 3583(e)(3), permits a district court, upon revocation of a term of supervised release, to impose a prison sentence or a sentence combining incarceration with a further term of supervised release, so long as (1) the incarcerative portion of the sentence does not exceed the time limit specified in the SRR provision itself, and (2) the combined length of the new prison sentence cum supervision term does not exceed the duration of the original term of supervised release." The district court here exceeded these limits by imposing a two-year prison term plus a new three-year term of supervised release after revoking defendant's original three-year term of release.

In remanding for recalculation of a new revocation sentence, the court added in a footnote that "we today join six other circuits in recognizing [Sentencing Guidelines] Chapter 7 policy statements as advisory rather than mandatory. . . . On remand, the lower court must consider, but need not necessarily follow, the Sentencing Commission's recommendations regarding post-revocation sentencing." The court reasoned that "although a policy statement ordinarily 'is an authoritative guide to the meaning of the applicable guideline,' *Williams v. U.S.,* 112 S. Ct. 1112, 1119 (1992), the policy statements of Chapter 7 are unaccompanied by guidelines, and are prefaced by a special discussion making manifest their tentative nature."). *But see U.S. v. Lewis,* 998 F.2d 497, 499 (7th Cir. 1993) (Chapter 7 policy statements are binding unless they contradict statute or guidelines) [6 *GSU* #1]. *Cf. U.S. v. Levi,* 2 F.3d 842, 845 (8th Cir. 1993) (finding, in context of ex post facto issue, that Chapter 7 is "a different breed" of policy statement and not binding law) [6 *GSU* #4].

See *Outline* at VII and VII.B.1, summaries of *Truss* and *Tatum* in 6 *GSU* #3.

Departures

CRIMINAL HISTORY

U.S. v. Clark, 8 F.3d 839 (D.C. Cir. 1993) (Remanded: District court departed downward to a sentence within the range that would have applied absent defendant's career offender status. Of the three grounds for departure, one was invalid and two were valid but required further findings. It was improper to depart based on the "unique status of the District of Columbia," wherein the U.S. Attorney controls whether prosecution is brought in local or federal court and defendant likely would have received a much lighter sentence in the local court. This is an exercise of prosecutorial discretion and "is not a mitigating factor within the meaning of 18 U.S.C. § 3553(b)."

Departure because career offender status overrepresents the seriousness of defendant's criminal history may be appropriate, but further findings are required here. Departure on the basis of defendant's lack of guidance as a youth and exposure to domestic violence may also warrant departure. Although the Nov. 1992 amendment to § 5H1.12, p.s., prohibits departure for lack of youthful guidance "and other similar factors," defendant's offense preceded the amendment and its application to his disadvantage would violate the ex post facto clause. *Accord U.S. v. Johns,* 5 F.3d 1267, 1269–72 (9th Cir. 1993). The appellate court cautioned, however, that "there must be

some plausible causal nexus between the lack of guidance and exposure to domestic violence and the offense for which the defendant is being sentenced."

The court further noted that the district court may "consider whether a nexus exists between the circumstances of Clark's childhood and his prior criminal offenses, for purposes of determining whether the seriousness of his criminal record is overrepresented under § 4A1.3." Additionally, "the district court may want to contemplate whether Clark's childhood exposure to domestic violence is sufficiently extraordinary to be weighed under U.S.S.G. § 5H1.3."

Finally, the court held that if the district court properly finds that career offender status overrepresents the seriousness of defendant's criminal history, it may depart to "the criminal history category and offense level that would have been applicable absent the career offender increases." *See also Reyes, infra*.).

See *Outline* at VI.A.2, VI.C.1.b and h.

U.S. v. Reyes, 8 F.3d 1379 (9th Cir. 1993) (Brunetti, J., dissenting) (Remanded: District court had authority to depart downward for career offender based on the overrepresentation of defendant's criminal history and offense compared to most career offenders. "His conduct was not at all of the magnitude of seriousness of most career offenders. . . . Convicted for selling .14 grams of cocaine, he was subject to the same base offense level and sentencing range as if he had sold almost 4000 times that much. 21 U.S.C. § 841(b)(1)(C). Under the career offender guideline a defendant convicted for a fraction of one gram of cocaine is accorded the harshest punishment due an offender trafficking in up to 500 grams. 21 U.S.C. § 841(b)(1)(C)."

The appellate court stressed, however, that the departure was not based on the small quantity of drugs per se: "Instead of emphasizing the absolute quantities of drugs involved, [the sentencing judge] cast the issue of quantity in comparative terms. Reyes' criminal history was 'comparatively minor.' His offenses were 'minor' as compared to others (not small on some absolute scale). . . . Quantity serves merely as the means to compare the similar treatment of defendants whose offenses differ by exceptional orders of magnitude. . . . While . . . the Commission did take into account varying penalties linked to different drug quantities . . . , we conclude that the sentencing ranges resulting in exceptional discrepancies were not adequately considered."

However, the district court did not adequately explain the extent of departure, which was down to the range that would have applied absent career offender status. The appellate court stated that such a departure may be appropriate, but the reasons must be articulated.).

See *Outline* at VI.A.2.

Substantial Assistance

U.S. v. Baker, 4 F.3d 622 (8th Cir. 1993) (Remanded: Defendant pled guilty to a drug charge and agreed to assist the government by providing information about others' drug trafficking. Although she provided some information, the government did not file a § 5K1.1, p.s. motion. The district court departed anyway under § 5K2.0, finding as a mitigating circumstance that "defendant was required to inform the Government of circumstances involving a close relative," which exposed her to family problems and "made it most difficult for the defendant to believe that she had not fulfilled her obligations . . . . The Court finds that, subjectively, the defendant had fulfilled her obligations and was therefore entitled to the 5K1.1."

The appellate court held this was an invalid departure. "The repercussions Baker experienced are mild forms of" the "injury" or "danger or risk of injury" listed as a consideration in § 5K1.1(a)(4), p.s., and "thus were considered by the Sentencing Commission." Defendant's "subjective belief that she had complied with the terms of the cooperation agreement is relevant only to the question of whether she did comply, which is merely a factor a district court should consider when determining the extent of a departure under § 5K1.1, *see* U.S.S.G. § 5K1.1(a)(1)-(3), p.s." The court also held that cooperation with the prosecution "simply cannot be sufficiently extraordinary to warrant a departure under § 5K2.0." The court reasoned that because there are no limits on the extent of a departure under § 5K1.1, "a district court may depart all the way down to a sentence of no imprisonment under § 5K1.1 so long as that departure is 'reasonable' in light of the defendant's assistance. The availability of an unlimited departure proves that § 5K1.1, if it recognizes a defendant's assistance at all, cannot recognize it inadequately.").

See *Outline* at VI.C.1.i, VI.F.1.b.i.

Adjustments

Acceptance of Responsibility

U.S. v. Gonzalez, 6 F.3d 1415 (9th Cir. 1993) (Reversed: District court erred in denying § 3E1.1 reduction because it did not believe defendant's reason for committing the crime. "Under § 3E1.1, Gonzalez was required to recognize and affirmatively accept personal responsibility for his criminal conduct. The record shows he did. . . . Neither § 3E1.1 nor any cases we have found state or otherwise indicate that a defendant's reason or motivation for committing a crime is an appropriate factor to consider in determining whether to grant the adjustment. Even if it were established that Gonzalez at some point in the proceedings lied about why he committed the crimes, this lack of candor . . . should play no part in the district court's § 3E1.1 determination.").

See *Outline* generally at III.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Ballard, 6 F.3d 1502 (11th Cir. 1993) (Affirmed: District court had authority to order that sentence for federal offense—committed by defendant while he was in state jail awaiting trial on state charge—would be consecutive to whatever state sentence defendant received, would not begin until after defendant's release from state custody, and would not be reduced by any time served on the state charge. Although the statute and Guidelines "do not address Ballard's exact situation," see 18 U.S.C. § 3584(a), U.S.S.G. § 5G1.3(a) and (c), they do not preclude the district court's action and, in fact, "evince a preference for consecutive sentences when imprisonment terms are imposed at different times.").

See *Outline* at V.A.2.